No. 9779.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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Summary of Argument.

POINT I.

There is a complete lack of credible testimony to support the finding attacked by the appellant.

POINT II.

The deleted portion of the contract is available to the court in determining the intention of the parties respecting waiver.

POINT III.

There can be no adverse presumption from the non-production of evidence when the burden is not upon the party to produce evidence.

POINT IV.

Opinion evidence is not admissible without a sufficient showing that the expert is qualified as to knowledge or skill.

Point I.—In Answer to Appellee's Point I.

There Is a Complete Lack of Credible Testimony to Support the Finding Attacked by the Appellant.

It may be conceded that the general rule is that the appellate court will not consider conflicts in testimony and will resolve any doubt in favor of the finding by the trial court. There are, however, exceptions to this general rule, and it is appellant's earnest contention that the facts in the present case fall within one of the exceptions.

The case of *Neilson v. Houle,* 200 Cal. 726, states an exception on page 727:

> "Where testimony, in the light of the undisputed facts, is so inherently improbable and impossible of belief as to, in effect, constitute no evidence at all, the rule that the amount of credit to be given to the positive testimony of any witness is solely a question for the trial tribunal, does not apply. Undoubtedly an appellate court, in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. . . . Even if there is a certain degree of improbability about much of the evidence that leaves it unsatisfactory to the mind of the appellate court, if it is not contradicted nor impeached except by its own weakness the decision of the lower court will not be disturbed."

In *Hales v. Snowden,* 19 Cal. App. (2d) 366, it is stated by the court, on page 372:

> "Of course, testimony which is inherently improbable may be disregarded (Neilson v. Houle, 200 Cal. 726 (254 Pac. 891)), but to warrant such action there must exist either a physical impossibility of the

evidence being true, or its falsity must be apparent, without any resort to inferences or deductions. (Powell v. Powell, 40 Cal. App. 155 (180 Pac. 346); Stahmer v. Stahmer, 125 Cal. App. 132 (13 Pac. (2d) 833).)"

A review of appellee's evidence as presented at the trial which is fully discussed under appellant's opening brief, Point III, clearly shows that the witnesses and evidence elicited from them is so incredible and impossible of belief as to constitute no evidence at all and any finding based upon such evidence would be clearly erroneous.

No extended discussion will be here indulged in, as the evidence has been fully covered in the opening brief.

Point II.—In Answer to Appellee's Point II.

The Deleted Portion of the Contract Is Available to the Court in Determining the Intention of the Parties Respecting Waiver.

Appellee has completely failed to comprehend the import of appellant's argument with respect to the deleted clause of the contract.

The deleted clause would have no modifying effect on the other terms and conditions contained in the contract, but the clause is nevertheless a part of the "four corners" of the instrument and can be considered in determining the interpretation of the contract and the intention of the parties at the time the contract was entered into.

It is for the purpose of determining the existence of a waiver that the clause is of prime significance. In view of its deletion, there can be drawn the inference that there was a reliance upon the terms of the contract that the equipment would be delivered "in good condition and ready

for use" at the time the contract was executed. There must be a showing subsequent to the execution of the contract to justify such a finding.

The appellee cannot point to any evidence in the record which indicated that appellant waived the terms of the contract. True the appellant was forced to make repairs in order to fulfill its obligation to produce a circus in accordance with the sponsors' contracts. There is, however, no conflict nor contradiction of the fact that appellant continually protested the deficiencies in the equipment.

The contention of appellee that waiver is a question of fact is not supported by the cases which it cites. Waiver is a mixed question of law and fact. But there can be no dispute about the law, for there is no evidence of waiver to be found in the record and any finding thereon is completely unsupported both in law and fact.

Point III.—In Answer to Appellee's Point IV.

THERE CAN BE NO ADVERSE PRESUMPTION FROM THE NON-PRODUCTION OF EVIDENCE WHEN THE BURDEN IS NOT UPON THE PARTY TO PRODUCE EVIDENCE.

Whatever the basis for the trial court's presumption may be, it is impossible to follow appellee's logic in its argument that it was upon the appellant to produce the higher evidence or suppressed evidence with respect to the rope when the appellee assumed the burden of proving the condition of the rope.

The appellee alleged in its complaint that the equipment was delivered in accordance with the terms of the contract. [Pr. Tr. p. 2.] The appellee attempted to prove this allegation by the testimony of its witnesses. The onus was, therefore, upon appellee and any intendment to be drawn from the non-production of the rope should have

been against appellee. Appellant neither had the burden to prove the condition, nor did it have the evidence in its possession. Appellee had assumed the burden of proof, and had the evidence in its possession, yet it asks the court to raise an adverse presumption against the appellant because it did not produce evidence which was part of appellee's case.

Point IV.—In Answer to Appellee's Point VI.

Opinion Evidence Is Not Admissible Without a Sufficient Showing That the Expert Is Qualified as to Knowledge or Skill.

Appellee attempts to justify the admission of the evidence objected to on behalf of appellant by showing the qualification of the witnesses.

The whole force of appellee's argument is lost when it is realized that appellant is not questioning the witnesses' qualifications as persons skilled in the circus trade. True as that may be, it is not shown that these experts made any sufficient examination of the equipment to qualify them to express an opinion with respect to this specific property. The testimony set forth under Points IX, X, XI and XII of appellant's opening brief shows that the experts had not made an examination sufficient to enable them to make any deductions with respect to the condition of the equipment. In order to form an opinion the expert must be presented with a hypothetical set of facts, or have an opportunity to make an observation of the physical facts.

In 10 *Cal. Jur.* 959 it is said, with respect to opinion evidence, that there are two classes of cases where opinions are admissible. The first is where the conclusion is to

be drawn from facts which are not common knowledge. The jury is then given the facts and draws its own conclusion. The present case does not fall within this class, but, rather, in the second class, of which it is said at page 960:

> "In the other class are found those cases in which the conclusions to be drawn from the facts stated, *as well as knowledge of the facts themselves,* depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence." (Italics ours.)

It cannot be stated that the witnesses show they had sufficient knowledge of the facts to warrant an expression of an opinion. None had made a complete and thorough examination of the equipment; and in the evidence given under Point X of appellant's opening brief the witness was not even present nor was a state of facts given to him upon which he could base an opinion. His testimony was idle speculation.

Conclusion.

The arguments presented under the other points in appellee's brief have been amply answered by appellant in its opening brief, therefore it is unnecessary to discuss them here. We submit that errors committed by the trial court entitle appellant to a reversal of the judgment.

Respectfully submitted,

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